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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91194523
Party	Defendant DJL LABS, INC.
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TRADEMARK

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Ser. No. 77/782216 Published December 15, 2009

Mark: BUG GONE IT & Design

OMS Investments, Inc.

Opposer

v.

DJL LABS, INC.

Applicant.

OPPOSITION NO. 91194523

BOX TTAB NO FEE

Asst. Commissioner for Trademarks

2900 Crystal Drive

Arlington, VA 22202-3513

Docket No: **L61.8F-14811-US01**

APPLICANT'S ANSWER TO NOTICE OF OPPOSITION

Applicant, DJL Labs, Inc., for its answer to the Notice of Opposition filed by Opposer OMS Investments, Inc. against application for registration of the trademark *BUG GONE IT & Design*, Serial Number 77/782216 filed July 16, 2009 and published in the Official Gazette on December 15, 2009 pleads and avers as follows (for ease of reference Opposer's allegation is set forth and Applicant's Answer follows):

1. Upon information and belief, applicant DJL Labs, Inc. is a Minnesota corporation with a mailing address of 9294 Norell Avenue, Stillwater, Minnesota 55082 ("Applicant").

Applicant's Answer:

Admitted.

2. As illustrated in Application Serial No. 77/782, 216, Applicant seeks to register the mark BUG GONE IT & Design for “Anti-insect spray; Insect repellents; Insecticides; Insecticides for domestic use” in International Class 05 (the “BUG GONE IT Mark”).

Applicant's Answer:

Admitted.

3. Since at least as early as 1933, Opposer, through its predecessors in interest, has been using in commerce in the United States trademarks incorporating the phrase “B-GON,” including the marks BUG-B-GON and BUG B GON MAX, in connection with a variety of goods.

Applicant's Answer:

Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph and accordingly denies them.

4. Today, Opposer uses its “B-GON” family of marks for a wide range of insect, animal and pest control products. Opposer owns numerous federal trademark registrations incorporating its famous and distinctive “B-GON” component, all as reflected in the following representative registrations issued on the Principal Register each of which are presently in full force and effect as shown by the records of the United States Patent and Trademark Office (“USPTO”):

Mark Reg. No. Goods

ANT B GON 2,646,066 Class 5: Insecticides for agricultural and domestic use.

BIRD B-GONE 2,658,355 Class 6: Spiked barrier for bird control.

BIRD-B-GONE 2,562,771 Class 6: Pest repellent devices, namely, a metal architectural barrier for preventing birds from landing and perching.

Class 19: Pest repellent devices, namely, a non-metal architectural barrier for preventing birds from landing and perching.

BRUSH-B-GON 1,301,169 Class 5: Pesticide-namely, herbicide.

BUG-B-GON 2,073,033 Class 5: Insecticides for home and garden use.

BUG B GON MAX 2,907,105 Class 5: Insecticides for home and garden use.

BUG B GON MAX 2,980,869 Class 5: Herbicides, insecticides, fungicides, miticides, pesticides, and molluscicides, all for domestic use.
GRASS-B-GON 1,995,777 Class 5: Pesticides and herbicides for home and garden use.
MOSQUITO-B-GON 2,952,817 Class 5: Insecticide for domestic use.
MOSS B GON 2,863,145 Class 5: Fungicide for domestic use.
SQUIRREL-BE-GONE 3,095,944 Class 21: bird feeders and bird feeder accessories, namely, squirrel baffles.
WEED-B-GON 0,903,3 17 Class 5: Herbicides.
WEED-B-GON 2,088,157 Class 5: Herbicides mixed with fertilizers for domestic use.
WEED B GON MAX 3,061,002 Class 5: Herbicides for domestic use.
WEED B GON PRO 3,285,498 Class 5: Herbicides for horticultural use.
WEED B GON PRO 3,290,291 Class 5: Herbicides for horticultural use.

True and correct copies of printouts from the USPTO's online database reflecting the current status and title of each of these registrations are attached as Exhibit A. Notably, Registration Nos. 2,646,066; 2,562,771; 2,658,355; 1,301,169; 2,073,033; 2,907,105; 1,995,777; 2,863,145; 0,903,3 17; and 2,088,157 are incontestable.

Applicant's Answer:

Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph and accordingly denies them. Printouts for each of the listed marks do appear to be attached as Exhibit A to the Notice of Opposition.

5. Opposer also owns pending federal trademark applications for additional "B GON" marks, including:

BUG – B-GONE 77/187581 Class 5: Pesticides, insecticides, fungicides, herbicides, rodenticides, miticides, parasiticides for domestic use; pesticides mixed with fertilizers for domestic use; herbicides mixed with fertilizers for domestic use; turf algacide, turf fungicide, and turf pesticide for agricultural and domestic use; animal repellents, insect repellents, insect repellents in topical form.

DEER-B-GON 78/898,038 Class 5: animal repellant used to repel deer and other ruminant animals and rabbits.

GRUB B GON 77/756,842 Class 5: insecticides for domestic and agricultural use.

True and correct copies of printouts from the USPTO' s online database reflecting the current status and title of each of these applications are attached as Exhibit B. The "B-GON" registrations and applications are hereinafter referred to as the "B-GON Marks." Each of the B GON Marks is distinctive and famous.

Applicant's Answer:

Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph and accordingly denies them. Printouts for each of the listed marks do appear to be attached as Exhibit b to the Notice of Opposition.

6. Notably, among Opposer's B-GON Marks are Registration No. 2,073,033 for BUG-B-GON; Registration Nos. 2,907,105 and 2,980,869 for BUG B GON MAX; and Application Serial No. 77/187,581 for BUG-B-GON (collectively, the "BUG B GON Marks").

Applicant's Answer:

Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph and accordingly denies them. Applicant does admit that these marks appear to be listed above in paragraph 4.

7. Today, Opposer's B-GON Marks, including the BUG B GON Marks, are some of the most recognizable and valuable marks in the consumer products industry. Moreover, due to the national, and indeed, worldwide consumer recognition and goodwill of Opposer's B-GON Marks,

consumers have come to recognize the terms B-GON and BUG B GON as also symbolizing the goodwill inherent in the BGON Marks, and further, associate the terms B-GON and BUG B GON solely with Opposer and its line of high quality products.

Applicant's Answer:

Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph and accordingly denies them.

8. No issue of priority exists with respect to Opposer's first use of one or more of its B-GON Marks as set forth above and Applicant's BUG GONE IT Mark. Opposer has used, promoted and advertised its goods, under one or more of its B-GON Marks in commerce since at least as early as 1933. Conversely, Applicant filed Serial No. 77/782,216 for the BUG GONE IT Mark on July 16, 2009, as intent-to-use application under Section 1(b) of the Lanham Act, which is Applicant's constructive date of first use. Accordingly, Opposer has priority over Applicant with respect to the B-GON Marks, including the BUG B GON Marks.

Applicant's Answer:

Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph and accordingly denies them. Applicant does admit that its constructive date of first use is July 16, 2009.

9. Applicant's proposed mark is confusingly similar to Opposer's B-GON Marks because they are similar in sound, meaning and appearance pursuant to 15 U.S.C. § 1052(d). Applicant's proposed BUG GONE IT Mark is nearly identical in sound, meaning and appearance to Opposer's BUG B GON Marks and mimics the overall commercial impression of Opposer's B-

GON Marks. Adding to this likelihood of confusion, Applicant's BUG GONE IT Mark covers the exact same products as offered by Opposer under its BUG B GON and B-GON Marks.

Applicant's Answer:

Denied.

10. Given the goodwill and public recognition arising from the association of the famous and distinctive B-GON Marks and BUG B GON Marks with Opposer, consumers are likely to believe that Opposer has licensed, approved or otherwise authorized Applicant's use of the BUG GONE IT Mark, when it has not.

Applicant's Answer:

Denied

11. The maturation of Applicant's application into registration will cause a likelihood of confusion, mistake or deception with respect to the source or origin of Applicant's goods. Consumers will erroneously believe that Applicant's goods are produced by or associated with Opposer.

Applicant's Answer:

Denied.

12. Applicant's use and registration of the proposed mark also constitutes dilution by tarnishment and dilution by blurring of Opposer's famous B-GON Marks and famous BUG GONE IT Marks, whose fame was established well before Applicant's constructive dates of first use of its proposed mark, as prohibited by 15 U.S.C. § 1125(c).

Applicant's Answer:

Denied.

13. Pursuant to 15 U.S.C. § 1063(a), Opposer will be damaged by registration of Applicant's proposed mark, which would grant Applicant a prima facie exclusive right to use the proposed mark despite Opposer's priority over Applicant and the likelihood of confusion, dilution, and injury to Opposer's goodwill that will be caused by Applicant's mark.

Applicant's Answer:

Denied.

14. In summary, registration of the proposed mark would be incorrect and improper in view of the requirements of the Trademark Act of 1946, as amended, including specifically but not limited to the provisions of 15 U.S.C. § 1051, et seq.

Applicant's Answer:

Denied.

DEFENSES

15. Applicant's trademark is manifestly distinct from the alleged mark(s) of the Opposer. Applicant prays that this Opposition be dismissed and that Applicant be granted registration of its trademark.

16. Applicant's trademark is substantially different in sound, appearance, connotation and overall commercial impression to Opposer's alleged BUG B GON and B-GON Marks.

17. Applicant's trademark BUG GONE IT evokes the similar saying DOG GONE IT, and therefore has a completely different connotation and commercial impression from Opposer's alleged marks.

18. None of Opposer's alleged marks, as listed in Exhibit A, include the term "IT" as part of an alleged trademark, nor use the term "IT" in connection with "GONE" or "GON".

Respectfully submitted,

DJL Labs, Inc.

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Dated: June 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Applicant's Answer**
to the Notice of Opposition was mailed via First Class Mail service, postage prepaid, to

Susan E. Hollander, Shannon S. King
Manatt, Phelps & Phillips LLP
One Embarcadero Center, 30th Floor
San Francisco, CA 94111
UNITED STATES

and emailed to patrademarks@manatt.com, ssking@manatt.com

on June 23, 2010.

/Richard A. Arrett/
Richard A. Arrett, Esq.